FEB 25 1955
HAROLD B. WILLEY,

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 620

R. A. ROGERS, also known as Roy A. Rogers,
Petitioner,

vs.

NOEL S. ALTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
in and for the First Appellate District,
Division One Thereof.

R. A. ROGERS,
5188 Coronado Avenue, Oakland 9, California,
Petitioner in Propria Persona.

Subject Index

	Page
Introductory statement	2
Grounds for hearing by the Supreme Court of the United States	15
Statement of the case	20
(a) The pleadings	20
(b) The denial of petitioner's motions to drop the case from the jury calendar and for a continuance	21
(c) The oral and documentary evidence	23
The verdict and the two judgments	24
Argument	25
(a) Neither count of the complaint states a cause of action against petitioner for fraud or otherwise	25
(b) The complaint shows on its face that each count is barred by the statute of limitations	28
(c) The evidence was insufficient as a matter of law to establish fraud on the part of petitioner	29
(d) The District Court of Appeal committed error in holding that the case involves an oral, voluntary and continuing trust	33
(e) The invalidity of the judgment and particularly that portion thereof which awards exemplary damages	34
Conclusion	37

Table of Authorities Cited

Cases	Pages
Adkins v. Potter, 211 Cal. 512	30
Alton v. Rogers, 127 A.C.A. 810	3, 4, 19, 37
Arakelian v. Sears, 53 Cal.App. 646	30
Bank of America v. Superior Court, 20 Cal.(2d) 697	36
Bass v. Katterjohn, 194 Ky. 284, 239 S.W. 53	20
Bretthauer v. Foley, 15 C.A. 19	33
Chambers v. Hodges, 23 Tex. 104	20
Chelini v. Nieri, 32 Cal.(2d) 480	34
Cherney v. Johnson, 72 C.A. 725	33
deValley v. Kendall de Vally Operalogue Co., Ltd., 220 Cal. 742	36
Delcampo v. Camparillo, 154 Cal. 647	28
Estate of Jamison, 31 Cal.(2d) 15	35
Farmers Auto Exchange v. Calkins, 39 Cal.App.(2d) 390	29
Fidelity Union Trust Co. v. Matthews, 128 N.J. Eq. 475, 17 Atl.(2d) 145	26
Foster v. Abrahams, 74 Cal.App. 521	33
Freeman v. The Rector, Wardens and Vestrymen of St. Mary's Parish, 37 Cal.(2d) 16	35
Galvin v. Palmer, 134 Cal. 426	19, 36
Grace v. Grace, 89 Cal.App.(2d) 395	29
Gray v. Galpin, 98 Cal. 633	29
Grundelfinger v. Mariposa Mining Co., 72 Cal.App.(2d) 540	29
Hasenjaeger v. Voth, 91 Cal.App. 394	26
Hawley v. Gray, 127 Cal. 56	19, 36
Holiday v. Tolosano, 39 Cal.App. 151	32
In re Wooley's Estate (Vt.), 117 Atl. 370	20
Jacobson v. Mead, 12 C.A.(2d) 75	32
Lataillade v. Orena, 91 Cal. 565	28
Lewis v. Winfield, 48 Cal.(2d) 543	35

Pages
Majors v. Majors, 70 Cal.App.(2d) 619 35
Maynes v. Angeles Mesa Land Co., 10 Cal.(2d) 587 27
Meehan v. Huntington Land and Improvement Co., 23 Cal. App.(2d) 349 32
Michaels v. Pacific Soft Water Laundry, 104 Cal.App. 366.. 29
Minnesota Thresher Mfg. Co. v. LeHeureux, 82 Neb. 692, 118 N.W. 565 20

Nichols v. Moore, 181 Cal. 131 29

O'Brien v. O'Brien, 197 Cal. 577 28

Paige v. Roeding, 96 Cal. 388 ..... 19, 36
People v. Greene, 74 Cal. 400 20
Parsons v. Smilie, 97 Cal. 647 33
Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 Pac. 295 20

Quindt v. Kilpatrick, 96 Cal.App.(2d) 824 29

Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319 3
Raine v. Spreckels, 54 Cal.App.(2d) 169 30
Reithmuller v. Burton, 176 Minn. 227, 222 N.W. 929 26
Rheingan v. Smith, 161 Cal. 362 27
Ryder v. Bamberger, 172 Cal. 791 30

Scholler Motors Co. v. Bankers' Trust Co., 216 Iowa 1147, 247 N.W. 638 26
Sears v. Rule, 27 Cal.(2d) 131 35
Shain v. Sresowich, 104 Cal. 402 28
Shaw v. McCaslin, 50 Cal.App.(2d) 467 27
Simonton v. Los Angeles Trust & Savings Bank, 205 Cal. 252 29
Simon v. Craft, 182 U.S. 436, 21 S.Ct. 836, 45 L.Ed. 1165.. 2

Title Guaranty & Surety Co. v. Foster, 84 Okl. 291, 203 Pac. 231 20
Traveler's Insurance Co. v. Beyers, 123 Cal.App. 473 29
Truett v. Onderdonk, 120 Cal. 581 ..... 29, 30

Vander v. Roach, 73 Cal. 614 29
Vertex Investment Co. v. Schwabacher, 57 Cal.App.(2d) 406 28
Von Schmidt v. Von Schmidt, 104 Cal. 547 ..... 19, 36

Pages

Walsh v. Macaire, 102 Cal.App.(2d) 435 35
Williams v. Spazier, 134 Cal.App. 340 30
Wilson v. Montgomery, 14 Smedes & M. (Miss.) 205 20
Wilson v. Sampson, 91 Cal.App.(2d) 453 29
Winina Oil Co. v. Barnes, 83 Okl. 248, 200 Pac. 981 20

Zell v. Bankers Utilities Co. (C.C.A. 9), 77 Fed.(2d) 22 ... 26

Codes

California Code of Civil Procedure:
Section 338, subdivision 4 ..... 13, 21
Section 2055 24

California Civil Code:
Section 3294 34

Constitutions

United States Constitution:
Fourteenth Amendment 12, 13, 14, 15, 17

Texts

Freeman on Judgments, Volume 1, page 644 20

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1954

No.

R. A. ROGERS, also known as Roy A. Rogers,

Petitioner,

vs.

NOEL S. ALTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California, in and for the First Appellate District, Division One Thereof.

Petitioner respectfully petitions this Honorable Court for a hearing and the issuance of a writ of certiorari to the District Court of Appeal of the State of California, First Appellate District, Division One thereof after denial of hearing by the Supreme Court of the State of California.

INTRODUCTORY STATEMENT.

The decision of the District Court of Appeal has placed the stamp of fraud on petitioner, a practicing attorney in the California Courts for more than thirty-five years.

If that decision is permitted to stand, petitioner's good name, will be taken from him and he will suffer irreparable injury, professional ruin and disgrace.

Petitioner's reputation has been unblemished and unsullied for more than three decades, yet by the charges of the Appellate Court as contained in its opinion, petitioner has been saddled with heavy vindictive damages, all because a promissory note, not the note of petitioner but of a client William P. Devou was partially unpaid.

These serious consequences have been visited upon petitioner by a void judgment of the trial Court, based on a complaint which fails to state a cause of action and upon evidence wholly insufficient to establish fraud.

Moreover petitioner has been denied the right to his day in Court, denied the right to the due process of the Fourteenth Amendment to the Constitution of the United States which protects against invasion by the state through any of its branches or officers, and whose essential elements are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case and the broad policy of the law which hears before it condemns and proceeds not arbitrarily or capriciously, but upon inquiry. (*Simon v. Craft,* 182 U.S. 436, 21 S.Ct. 836,

45 L.Ed. 1165; *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319.)

Petitioner was tried in absentia by reason of his being in Washington, D. C. in a matter before The Tax Court of the United States in the matter of the *Commissioner of Internal Revenue v. Irmgard Soares Santos,* the facts of which are more particularly set forth in petitioner's affidavit in support of his motion for a new trial pages 92 to 99 clerk's transcript on appeal in that certain action entitled *Noel S. Alton v. R. A. Rogers* also known as Roy A. Rogers, numbered 15,928 of the District Court of Appeal of the State of California, First Appellate District thereof and in brief are as follows:

That heretofore and on the 21st day of November, 1952 affiant was directed by his client Irmgard Soares Santos, who had at about the hour of 5 o'clock p.m. of that day received certain papers from her then attorney stating that said attorney had withdrawn from her tax case and said client insisting that petitioner ascertain from the clerk of The Tax Court of the United States what papers had been filed and what charges had been made by the government in said matter as liens aggregating several hundred thousand dollars had been assessed against petitioner's client and her husband.

That petitioner was taken by surprise by the late hour of his substitution in said tax matter and the following day being Saturday, November 22, 1952 and said office of the Tax Court of the United States,

Washington, D. C., being closed and petitioner being unable to obtain any information for his client and realizing that the case of *Alton v. Rogers* might go to a jury department on Monday, November 24, 1952, that petitioner found himself unable to notify the presiding judge of said Superior Court and by reason of the urgency of said matter and the many problems which said tax matter presented to petitioner that petitioner was unable to communicate with his counsel at said time, and petitioner being further informed by his client that November 29, 1952 was the terminal date when a motion could be made to vacate a previous order of said Tax Court consolidating the tax matters of petitioner's client and her husband and by reason of the fact that petitioner's client had no papers pertaining to said tax matters, and petitioner and his client being wholly ignorant of the basis of taxes claimed by the government and at the insistence of petitioner's client, petitioner left for Washington, D. C. hoping to be able to complete certain preliminary matters and return for said trial.

That petitioner before leaving found himself unable to use any means such as the long distance telephone or the Western Union telegraph to obtain any relief for his client, it being long after office hours in Washington, D. C., on Friday, November 21, 1952 when petitioner was informed by his client of her predicament.

That by reason of Thursday, November 27, 1952 of the following week being Thanksgiving and petitioner's appearance having to be filed and a motion

made to set aside an order of consolidation of certain tax matters in said Tax Court and petitioner being wholly ignorant of the complicated situation forthwith departed for Washington, D. C.

That petitioner's counsel made a request for a reasonable continuance of the trial of said action on Monday, November 24, 1952 which request was promptly denied by said Court.

That the refusal of a reasonable request for a continuance of the trial of said matter when such serious charges had been made against petitioner and while petitioner was engaged in legal work in Washington, D. C., was an abuse of discretion by the trial Court and was arbitrary, capricious and unjust and deprived petitioner of his day in Court.

That although the trial of said matter did not take place until December 2, 1952, petitioner found himself unable to leave Washington, D. C. by reason of certain hearings in said tax matters and so notified his attorney, who petitioner is informed notified the presiding judge, requesting a reasonable continuance to permit petitioner to return for said trial and offer his defense to respondent's charges, but that said request for a reasonable continuance of said trial based on the affidavits of petitioner and his said attorney was denied by said Court.

That the denial by said Court of petitioner and petitioner's attorney's request for a reasonable continuance was an abuse of discretion by said Superior Court and was arbitrary, capricious and unjust and

did deprive petitioner of his day in Court to refute the serious charge and exorbitant demands made against him by respondent.

That at the time of requesting said continuance petitioner's counsel was without any of the papers, files or records necessary for the trial of said action and having been in said case but a short while before said trial was wholly unfamiliar with matters involved, which covered a period of eleven years more or less.

That respondent gave false testimony at the time of said trial as to the amount of money loaned by him to William P. Devou, in this that respondent testified at said time that the amount loaned by him to Devou was the sum of $4,150 whereas in truth and in fact said sum so loaned by respondent on October 27, 1941 was the sum of $3,000 and that respondent was to receive a bonus of $1,450 for such loan as is more fully set forth in petitioner's affidavit and amendment thereto in support of his motion for a new trial, pages 98 and 99 clerk's transcript on appeal.

That petitioner by his affidavit in support of his motion for a trial page 104 clerk's transcript terminated any relation of attorney and client with respondent on August 21, 1941 and respondent's loan to Devou was not made until October 27, 1941, so that there was no confidential relation between petitioner and respondent from and after August 21, 1941.

That petitioner specifically refers to pages 106 to 124 of his affidavit in support of his motion for a new

trial of the reporter's transcript and exhibits thereafter attached for petitioner's statement of the facts involved.

That at all times while acting as counsel for William P. Devou petitioner followed the instructions of his client.

Petitioner cites this honorable Court to page 102 reporter's transcript line 26 as to the testimony of respondent in a meeting with Devou, which is in great variance with the facts as set forth by petitioner pages 106 to 111 reporter's transcript.

Petitioner sets forth a letter of December 1, 1943, page 113 of reporter's transcript and particularly refers to Exhibit No. 3 as therein set forth which is attached to said exhibits pages 125 to 126 reporter's transcript.

Again at page 95 reporter's transcript respondent testified that the loan of two sums of money was a loan to petitioner for Mr. Devou. This petitioner denies ever having received two sums of money or any other sum of money from respondent for William P. Devou.

That on appeal to the District Court of Appeal, State of California, First Appellate District, that Court held that a confidential relationship existed between appellant and respondent, when no such relationship existed from August 21, 1941, and said Appellate Court further ordered the first judgment which it characterized as "void" be stricken from the record and appellant's appeal therefrom dismissed and the second judgment of January 16, 1953, (which was a

separate judgment on a second count of the complaint) was ordered modified by incorporating therein in toto the first judgment of December 4, 1952. The Appellate Court in its judgment further ordered the verdict of December 3, 1952, and the findings, conclusions and judgment of January 16, 1953, as modified, because of an error in computations, is further modified by reducing the award for $6,939 to $6,767.37. It further ordered that the ends of justice require that respondent the plaintiff therein recover costs on both appeals.

This judgment of the District Court of Appeal was entered October 1, 1954.

No rehearing was requested by petitioner of said District Court of Appeal but thereafter and within the time allowed by law, petitioner did on November 10, 1954 petition the Supreme Court of the State of California for a hearing of his rights, claiming in said petition in the summary thereof at paragraph (7) as follows:

> "That appellant has suffered an unjust and unwarranted injury to his personal and professional reputation, heretofore unblemished, that he was denied the right to present his case and that he has been deprived of his property without due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States."

Petitioner at page (3) of his said petition to said Supreme Court of the State of California did at said time also set forth:

"He has also been deprived of the equal protection of the laws also guaranteed by the Fourteenth Amendment.

"In spite of appellant's absence from the State and his suddenly enforced appearance before a Federal Court, and the unfamiliarity of his counsel with the evidence, his adversaries proceeded to try him in absentia, and he was deprived of the effective representation by counsel essential to due process of law. (*Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158.)"

That also in the same petition petitioner set forth on pages 82 and 83 as follows:

"We believe that we have fully covered all of the twelve grounds for a hearing by this Court specified at the commencement of this petition. It is submitted that without the slightest evidence of fraud, the District Court of Appeal has affirmed a void judgment of the Superior Court, not only holding appellant liable for a debt he never did contract, but penalizing him with exemplary damages because the plaintiff had not collected the full amount of a promissory note. We submit that this result finds no precedent in any reported decision and is unparalleled in the annals of judicial procedure. It is likewise submitted that by denying appellant an opportunity to be heard, the Superior Court and the District Court of Appeal have deprived him of due process of law and the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States. This right appellant now specially sets up and claims.

"Wherefore your petitioner respectfully prays Your Honors for an order granting a hearing

by this Honorable Court after decision by the District Court of Appeal, and that upon such hearing, the judgment of the Superior Court be reversed and the cause remanded to the Court below with directions to dismiss the action."

That thereafter and on or about November 24, 1954 Hon. Chief Justice Gibson of the Supreme Court of the State of California made an order denying petitioner's petition for a hearing.

That such denial by the Supreme Court of petitioner's petition ignored the affirmative appearance in the record on appeal that decision of a federal question presented to said Court was necessary to a determination of said cause, and that such federal question was actually decided adversely to petitioner and that the order of said State Supreme Court could not have been made without so deciding it, adversely to petitioner.

That thereafter and on November 29, 1954, petitioner made application to the District Court of Appeal, First Appellate District thereof for an order staying execution and enforcement of said judgment to enable appellant to obtain a writ of certiorari from the Supreme Court of the United States, appellant having deposited the sum of $22,198 in cash on February 13, 1953 with the County Clerk of the Superior Court of the State of California in and for the City and County of San Francisco, in lieu of an undertaking on appeal and in accordance with the California statutes in such cases made and provided,

and said sum of $22,198 is now and ever since has been on deposit with said county clerk.

That Hon. Justice Peters of said District Court of Appeal upon appellant's application for such stay of execution ordered execution on said judgment stayed for a period of ninety days from and after November 29, 1954 as follows:

> "ORDERED that if the said appellant shall file or cause to be filed a petition for a writ of certiorari to review the said judgment together with a transcript of the record and proceedings in the case as provided in subdivision I of Rule 21 of the Rules of the Supreme Court of the United States within said period of ninety (90) days, then the execution and enforcement of the judgment aforesaid be further stayed until the final judgment, order or decree of the Supreme Court of the United States in the premises; but if said petition and record be not so filed within said period of time, then this stay shall cease and determine."

It is submitted that a hearing by the Supreme Court of the United States is necessary for the following reasons:

(I) That a decision of a federal question is necessary to a determination of petitioner's rights in this:

(a) That petitioner specifically set up and claimed in his petition to the Supreme Court of the State of California the final Court in which a decision could be had, a title, right and privilege and immunity under the Constitution of the United States, to-wit, that by

the judgment and decree of the District Court of Appeal, petitioner has been deprived of his property without due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(b) That petitioner has been denied due process of law by the Superior Court of the State of California in and for the City and County of San Francisco in that said Court never heard nor ruled on petitioner's motion for a new trial after judgment entered against petitioner in said Court.

(c) That petitioner has been deprived of his property without due process of law and of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution o the United States by the District Court of ppeal unlawfully incorporating a void judgme in a second judgment which procedure disreg rded decrees of Courts of the United States.

(d) That petitioner has been deprived of his property without due process of law and of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States in having two judgments rendered against him on one complaint containing two counts which procedure disregarded decrees of Courts of the United States.

(e) That petitioner was denied due process of law by the trial Court in forcing petitioner to a jury trial on the first count of said complaint based on breach of trust and accounting, since these issues were essentially equitable in nature and disregarded decrees of the Courts of the United States.

(f) Petitioner has been deprived of his property without due process of law guaranteed by the Fourteenth Amendment by the District Court of Appeal affirming the judgment against petitioner on the first cause of action for the reason that said cause of action is barred by the provisions of Code of Civil Procedure of the State of California Sec. 338 sub. (4) thereof and further said cause of action is barred by waiver and disregards decrees of Courts of the United States.

(g) Petitioner has been deprived of his property without due process of law guaranteed by the Fourteenth Amendment by the District Court of Appeal affirming the judgment against petitioner on the second cause of action for the reason that cause of action is barred by the provisions of Code of Civil Procedure Sec. 338 sub. (4); said cause of action is barred by waiver; the judgment is not supported by substantial evidence and the jury was misdirected to the prejudice of petitioner and thereby disregarded decrees of Courts of the United States.

(h) Petitioner has been deprived of his property without due process of law as guaranteed by the Fourteenth Amendment in this that the pleadings and the evidence wholly fail to show that petitioner was guilty of any fraud and the affirmance by the District Court of such judgment thereby disregards decrees of the Courts of the United States.

(i) Petitioner his been deprived of his property without due process of law as guaranteed by the Fourteenth Amendment in that respondent's claims as affirmed by the District Court of Appeal was barred by the Statute of Limitations of the State of California and said judgment thereby disregarded decrees of Courts of the United States.

(j) That petitioner has been deprived of his property without due process of law as guaranteed by the Fourteenth Amendment in that the respondent in accepting a second note, which he accepted after a full disclosure, is barred from maintaining his said action, and the affirmance by the District Court of Appeal of said judgment in regard thereto disregards decrees of the Courts of the United States.

(k) That petitioner has been deprived of his property without due process of law as guaranteed by the Fourteenth Amendment in that nowhere in the evidence is there any proof entitling respondent to exemplary damages and such judgment thereby as affirmed by the Dis-

trict Court of Appeal in regard thereto disregards decrees of the Courts of the United States.

GROUNDS FOR HEARING BY THE SUPREME COURT OF THE UNITED STATES.

(1) Petitioner has been deprived of his property without due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States in that judgments were entered against him at a time when he was absent from the State of California on a sudden enforced appearance before The Tax Court of the United States in Washington, D.C. and the unfamiliarity of petitioner's counsel with the evidence, at which time petitioner was tried *in absentia* without effective representation by counsel essential to due process of law.

(2) That by reason thereof petitioner has been denied his day in Court to interpose his defense to said action.

(3) That petitioner has claimed and specifically set up such constitutional title, immunity and privilege right in his Petition for a Hearing by the Supreme Court of the State of California in the summary of said petition and at pages 3 and 83 thereof, which petitioner respectfully refers to and makes a part of this petition.

(4) That the Supreme Court of the State of California, the highest Court to which petitioner could appeal denied his petition and in so doing could not

have made such denial of petitioner's appeal without deciding the federal question so presented by petitioner.

(5) That at the time of the trial of said action before a jury, petitioner's counsel moved for a continuance by reason of petitioner's absence in matters pending before The Tax Court of the United States in Washington, D. C., and when such motion was denied, petitioner's counsel asked permission to withdraw from said case but the trial judge insisted that said counsel remain at the trial, at which time petitioner's counsel informed said trial judge that he would remain mute and did remain mute in so far as petitioner's defense was concerned for said entire trial. That no witnesses were cross-examined by petitioner's counsel nor did petitioner's counsel participate in said trial in any way, although ordered by said trial judge to remain in attendance at said trial.

That petitioner has at times and still has a valid defense to all charges made against him by respondent but has been prevented from asserting said defense.

(6) That the complaint of respondent does not nor does either of said counts state facts sufficient to constitute a cause of action for fraud or to entitle respondent to any relief against petitioner.

(7) The evidence was insufficient as a matter of law to establish fraud on the part of petitioner.

(8) The evidence produced by respondent, both oral and documentary shows without conflict that his claim was barred by the statute of limitations.

(9) The District Court of Appeal committed error in the following particulars:

(a) In holding that the allegations of the complaint touching the discovery of the alleged fraud were sufficient and in holding that the case involves an oral voluntary and continuing trust, when the evidence conclusively negatives any theory of a trust.

(b) In upholding the action of the trial Court in submitting legal issues to a jury without first disposing of the equitable issues and over the objections of petitioner's counsel.

(c) The judgment for both compensatory and punitive damages is admittedly void and specifically stated to be void by said District Court of Appeal and its subsequent act in ordering said void judgment incorporated in a subsequent judgment thereby depriving petitioner of his property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

(d) Petitioner was denied due process of law by the District Court of Appeal denying petitioner's claim that respondent's causes of action were inconsistent and that an election was required.

(e) Denying petitioner due process of law by ruling that the fraud if any, was waived by the conduct of the respondent.

(f) Denying petitioner due process of law by omitting incorrectly stated material facts in its opinion.

(g) Denial of due process of law to petitioner in denial by trial Court of petitioner's motion for a new trial.

(h) Denial of due process of law in depriving petitioner of his property in upholding award for punitive damages.

(i) Depriving petitioner of his property without due process of law in charging petitioner with compensatory and punitive damages on a loan of money made by respondent to one William P. Devou, a client of petitioner, and the acceptance by respondent of a promissory note from said Devou by respondent and the failure of respondent to show he suffered any damages by reason of said note being uncollectible or the maker thereof insolvent.

That said District Court of Appeal, First Appellate District, Division One thereof on page xxi of its decision by its own act nullified any judgment for exemplary damages against petitioner when it declared:

"For reasons already stated it is ordered that the first judgment of December 4, 1952 having been entered prematurely, is void and ordered stricken from the record and the purported appeal therefrom dismissed; the second judgment of January 16, 1953 is ordered modified by incorporating therein in toto the judgment of December 4, 1952; the verdict of December 3, 1952 and the findings, conclusions and judgment of January 16, 1953, as modified because of an error in computations is further modified by reducing the award of

$6,939 to $6,767.37. As so modified, the judgment is affirmed. The ends of justice require that plaintiff recover costs on both appeals. It is so ordered.

Peters, P. J.

Bray, J., and Wood (Fred B.), J., concurred.

Filed October 1, 1954.

If there are two judgments in a record the latter in point of time must be deemed the true and final judgment in the case. (*Galvin v. Palmer,* 134 Cal. 426, 428; *Paige v. Roeding,* 96 Cal. 388; *Von Schmidt v. Von Schmidt,* 104 Cal. 547; *Hawley v. Gray,* 127 Cal. 56.)

Accordingly the only judgment left standing is the judgment rendered by the trial judge and signed by him for $6,939. By entering this judgment, the trial Court adjudicated in effect that the sum last mentioned was all the plaintiff was entitled to recover. There is thus a legal *exeunt* of the exemplary damages.

It is unnecessary to argue further that the first judgment entered on the verdict of the jury was void. The District Court of Appeal holds that it was void. (*Alton v. Rogers,* 127 A.C.A. 810, 821.)

The Appellate Court has gone even farther than that; it has ordered the first judgment stricken from the record, "and the purported appeal therefrom dismissed".

It then proceeds to give Alton his exemplary damages by ordering the void judgment which it has just

stricken from the record, incorporated in the second judgment.

Such action of the Appellate Court is void for want of jurisdiction.

Such a judgment has been characterized as a "dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff". (Freeman on Judgments, Vol. 1, page 645; *People v. Greene,* 74 Cal. 400; *Bass v. Katterjohn,* 194 Ky. 284, 239 S.W. 53; *Title Guaranty & Surety Co. v. Foster,* 84 Okl. 291, 203 Pac. 231; *Winina Oil Co. v. Barnes,* 83 Okl. 248, 200 Pac. 981; *In re Wooley's Estate* (Vt.), 117 Atl. 370.)

Freeman on Judgments, Vol. 1, page 644 states the law applicable to void judgments as follows:

> "The fact that the void judgment has been affirmed on review in an appellate court, or an order or judgment renewing or reviving it entered, adds nothing to its validity". (*Minnesota Thresher Mfg. Co. v. LeHeureux,* 82 Neb. 692, 118 N.W. 565; *Pioneer Land Co. v. Maddux,* 109 Cal. 633, 42 Pac. 295; *Wilson v. Montgomery,* 14 Smedes & M. (Miss.) 205; *Chambers v. Hodges,* 23 Tex. 104.)

STATEMENT OF THE CASE.

(a) The pleadings.

On February 2, 1951 the respondent Noel S. Alton filed a complaint in two counts naming as defendants therein the petitioner and William P. Devou. (C.T. 1 to 17 inclusive.)

Said complaint styled "Complaint for Damages, Breach of Trust, fraud and deceit", shows by its allegations that it wholly fails to state a cause of action on any of the grounds named and moreover it appears on its face that the purported claims of respondent were barred by the Statute of Limitations.

Defendants jointly challenged the sufficiency of the complaint by timely demurrer, both general and special. (C.T. 20.)

This demurrer was overruled (C.T. 23) and defendants then filed separate answers. (C.T. 25, 28.)

Petitioner's answer sets forth three affirmative defenses, first, that the causes of action were barred by subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California; second, that by the acceptance by respondent of a promissory note dated July 23, 1949, that the alleged fraud was waived by respondent; third, that it appears on the face of the complaint that respondent's remedy if any is solely against defendant Devou on a promissory note executed by him and delivered to respondent. (C.T. 29.)

(b) The denial of petitioner's motions to drop the case from the jury calendar and for a continuance.

The cause was originally set for a trial with a jury.

The order was made by the presiding judge of the Superior Court October 28, 1952, and the trial date set for November 25, 1952.

On November 18, 1952 petitioner filed notice to drop said case from the jury calendar (C.T. 50), upon the

grounds, inter alia, that proper notice of the trial date had not been given counsel for petitioner; that no demands for a jury trial had previously been made by respondent and that "the issues framed by the pleadings herein are not triable by a jury, and therefore plaintiff is not entitled to have said issues tried by a jury".

On November 21, 1952 this motion was denied without prejudice by the Superior Court. (C.T. 53.)

The cause thereafter and on December 1, 1952 came on for trial before the Honorable Daniel R. Shoemaker, Judge of the Superior Court and before the empanelment of the jury certain proceedings took place in the judge's chambers, at which time petitioner's counsel renewed the motion for a continuance previously stated, citing a number of authorities. (R.T. I-IX.)

Having cited the authorities counsel for petitioner herein then moved the Court for a continuance of the trial to January 5, 1953 and in support of his motion filed an affidavit of petitioner made in Washington, District of Columbia, setting forth the fact that petitioner was then detained in Washington, D. C. on important legal business over which petitioner had no control, that such business was so pressing as to admit of no delay and that petitioner's counsel is not fully and thoroughly acquainted with petitioner's case and that petitioner will prove a meritorious defense to respondent's alleged action and that said application for continuance is made in good faith and not for the purpose of delay, and that respondent would

not suffer any damages or prejudice by continuing said trial to January 5, 1952. (R.T. IX-XI.)

Petitioner's counsel at said time also filed his affidavit stating he was not in possession of all of the facts of the case, the names of the witnesses or the letters and correspondence between the parties since 1941 and that the presence of petitioner was indispensably necessary, not only as a witness in his own behalf to refute the facts stated in respondent's complaint, but to assist his counsel as an advisor in conducting said trial; that affiant is not as well prepared to try the case without petitioner and therefore cannot safely proceed to trial without him. (R.T. XI-XII.)

There was no showing of opposition by respondent or his counsel by affidavit or otherwise to the foregoing affidavit of petitioner and his counsel.

The trial Court thereupon denied petitioner's motion for said continuance (R.T. XXII), ordering petitioner's counsel to remain in attendance at said trial after petitioner's counsel informed the Court that he would remain mute during said proceedings.

(c) The oral and documentary evidence.

Reference is herewith made to the evidence both oral and documentary offered by respondent at said trial:

Respondent was the first witness and testified. (R.T. 6 to 48 and 77 to 103.)

There was the testimony of respondent's wife and testimony by Paul W. Rathford, Elizabeth Venning

and Mary E. Kean. There was also testimony by one Lester G. King, a police officer.

The testimony of William P. Devou was taken under Section 2055 of the Code of Civil Procedure of the State of California. (R.T. 139.)

He testified in part (R.T. 140, 141), "I didn't have enough money to finance the litigation in Ohio and Mr. Rogers said he could borrow some, and I said all right go ahead and borrow it".

The witness identified his signature to Plaintiff's Exhibit 33 on two typewritten pages, which authorized petitioner to pay certain creditors of William P. Devou.

THE VERDICT AND THE TWO JUDGMENTS.

The jury as heretofore stated brought in a verdict in favor of respondent for $15,000 punitive damages and compensatory damages in the sum of $6399. (C.T. 79.)

Just prior to the submission of the case counsel for Devou made a motion for a nonosuit (C.T. 77) which was denied. Thereafter and on the following day respondent's counsel moved to dismiss said action against Devou. (C.T. 78.)

On December 4, 1952, the clerk of the Court entered judgment on the verdict in the sum of $21,939 and costs in the sum of $259. (C.T. 81.)

On December 17, 1952, petitioner filed a notice of intention to move for a new trial on all the statutory grounds. (C.T. 85.)

On January 16, 1953, the trial judge signed findings of fact and conclusions of law. (C.T. 90-91.)

On January 16, 1953, petitioner filed an affidavit in support of his motion for a new trial and a subsequent affidavit three days later annexing certain important documents thereto, in all twenty-three exhibits in support of his motion for new trial. (C.T. 92-128.)

No counteraffidavits were filed except by respondent's counsel and these dealt only with the denial of the motion for a new trial.

The affidavit of petitioner shows in a letter of the respondent that on December 1, 1943 respondent only claimed a loan of $3000 to Devou.

The affidavits and exhibits demonstrate that respondent was fully informed at the outset of the Ohio litigation of Devou.

No counter showing was made against petitioner's affidavits or exhibits in petitioner's request for a new trial, which was denied by operation of law.

Petitioner took appeals from both judgments. (C.T. 155, 162.)

ARGUMENT.

(a) NEITHER COUNT OF THE COMPLAINT STATES A CAUSE OF ACTION AGAINST PETITIONER FOR FRAUD OR OTHERWISE.

Stripped of its essentials and its rambling, redundant and vituperative verbiage, respondent's complaint is merely this:

That petitioner represented to him that petitioner had a good investment of a loan to Devou; that Devou's claims were in a contested probate action; that certain payments were made on said loan, which petitioner alleges was the sum of $3000 with a bonus of $1450 and which respondent claims was a loan of $4150 and that respondent received from petitioner a promissory note on July 23, 1948 in the sum of $5339.44 signed by Devou.

Devou testified for the respondent and did not deny his signature to the note.

The due date of the second note is not set forth in either count of the complaint.

There is no allegation that respondent refused to accept it.

There is no allegation in respondent's complaint that he ever tendered the note to Devou for payment or that such payment was ever refused or that Devou was insolvent and the note uncollectible.

The law presumes that a person is solvent and not insolvent. (*Hasenjaeger v. Voth,* 91 Cal. App. 394 at page 397; *Scholler Motors Co. v. Bankers' Trust Co.,* 216 Iowa, 1147, 247 N.W. 638; *Reithmuller v. Burton,* 176 Minn. 227, 222 N.W. 929; *Fidelity Union Trust Co. v. Matthews,* 128 N.J. Eq. 475, 17 Atl. (2d) 145. There is no presumption of insolvency. (*Zell v. Bankers Utilities Co.* (C.C.A. 9), 77 Fed. (2d) 22, 27.)

A reading of paragraph IV of the first count of the complaint and II of the second count will show at once that the alleged statements and representa-

tions were promissory in character and was not a representation of a past or present fact.

There is no allegation in either count that said statements were made in bad faith or without any intention of performing them.

Promissory representations are neither actionable nor matters for defense.

Representations made by the payee to the maker of a note as to the purposes for which he intends to use the note are but promissory representations as to future conduct and not false representations as to existing facts. (*Shaw v. McCaslin,* 50 Cal. App. (2d) 467, 471.)

The mere making of a promise which the promisor afterwards fails or refuses to perform does not constitute actionable fraud. (*Rheingan v. Smith,* 161 Cal. 362.)

In *Maynes v. Angeles Mesa Land Co.,* 10 Cal. (2d) 587, the Court said, at page 589:

> "The mere failure to carry out a promise is not a tort and it is therefore essential in pleading fraud consisting of false promise to allege the elements of fraud. (See *Rheingan v. Smith,* supra; *Ayers v. Southern Pac. R. Co.,* 173 Cal. 74, 79 (159 Pac. 144), L.R.A. 1917E 949; *Jacobson v. Mead,* 12 Cal. App. (2d) 75, 82 (55 Pac. (2d) 285).)"

(b) THE COMPLAINT SHOWS ON ITS FACE THAT EACH COUNT IS BARRED BY THE STATUTE OF LIMITATIONS.

The loan was made in 1941.

It is set forth in the complaint that respondent does not know whether Devou ever executed said note, but this again does not constitute actionable fraud. The mere promise to reduce a contract to writing and refusal or failure so to do does not constitute fraud. (*O'Brien v. O'Brien,* 197 Cal. 577.)

If the transaction was a mere loan not evidenced by an instrument in writing the statutory period would be two years from and after October, 1941; if a note was executed it would have been barred by the four year statute after the date of maturity of the note which would have been sometime in 1946.

If fraud is relied on by the respondent the facts and circumstances of such fraud, the date of its discovery and the reason why such discovery was not made sooner must be set forth and pleaded with particularity. A party seeking to avoid the bar of the statute of limitations on account of fraud must show that he used due diligence to discover it and should state when any particular discovery was made and why it was not made sooner. (*Lataillade v. Orena,* 91 Cal. 565.)

The presumption is always against fraud and one seeking relief against fraud must allege and prove it by clear and satisfactory evidence. (*Delcampo v. Camparillo,* 154 Cal. 647; *Shain v. Sresowich,* 104 Cal. 402; *Vertex Investment Co. v. Schwabacher,* 57

Cal. App. (2d) 406; *Grace v. Grace,* 89 Cal. App. (2d) 395.) The same rule applies to an action to recover damages for fraud. (*Nichols v. Moore,* 181 Cal. 131.)

Each count of the respondent's complaint is absolutely destitute of these vital and necessary allegations.

(c) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH FRAUD ON THE PART OF PETITIONER.

In the foregoing subdivision of this argument, it has been respectfully set forth the law applicable to actions where fraud is charged.

The same rules of course apply to the sufficiency of the evidence. It has been stated in innumerable decisions that fraud is odious and is never presumed (*Vander v. Roach,* 73 Cal. 614; *Gray v. Galpin,* 98 Cal. 633; *Simonton v. Los Angeles Trust & Savings Bank,* 205 Cal. 252; *Quindt v. Kilpatrick,* 96 Cal.App. (2d) 824; *Wilson v. Sampson,* 91 Cal.App.(2d) 453; also that the presumption against fraud approximates in strength that of innocence of crime, (*Michaels v. Pacific Soft Water Laundry,* 104 Cal.App. 366; *Truett v. Onderdonk,* 120 Cal. 581; *Traveler's Insurance Co. v. Beyers,* 123 Cal.App. 473; *Farmers Auto Exchange v. Calkins,* 39 Cal.App.(2d) 390; *Grundelfinger v. Mariposa Mining Co.* 72 Cal.App. (2d) 540.

Also that in action for damages for fraud, if there are two inferences equally reasonable and equally capable of being drawn from the proved facts, the

one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the court or jury to draw the inference favorable to fair dealing. (*Ryder v. Bamberger,* 172 Cal. 791; *Truett v. Onderdonk,* supra; *Adkins v. Potter,* 211 Cal. 512; *Arakelian v. Sears,* 53 Cal.App. 646; *Williams v. Spazier,* 134 Cal.App. 340; *Raine v. Spreckels,* 54 Cal.App.(2d) 169.)

The District Court of Appeal in its opinion stated that petitioner stated to respondent "that he had an elderly client named Devou who had a large estate in Ohio, but was required to post a bond in a probate proceeding."

This point is made by the District Court of Appeal (127 A.C.A. 817):

> "Although the loan was to be made to Devou for a special purpose the money was not used for that purpose. The evidence is ample to support the construction that the money was used by defendant to generally finance litigation."

There is nothing in the record to justify either of these statements, so made by the Court.

There is not a word of testimony that petitioner ever stated that Devou was required to post a bond in the probate proceeding.

There is no mention of a bond or even any requirement for a bond in the reporter's transcript.

The only mention of such a bond is in respondent's complaint and that is obviously not evidence.

Accordingly one of the alleged false representations stands absolutely unproven.

As to another specification of falsity or representation by petitioner that "the court action in which Devou was interested was not merely for probate of the will of the father of William P. Devou and the distribution of his father's estate—but said action was a contested action to construe a will and for declaratory relief."

These representations are alleged to have been made on or about the month of October, 1941—this date is important.

Now the action for declaratory relief was not commenced by the sister of Devou until March 17, 1949—some seven years and four months after the money was lent by respondent.

Since the petitioner obviously could not have made false representations as to litigation which had not been commenced and which was not commenced until seven years after the alleged making of the alleged representations, it is quite obvious that the remaining alleged false representations, not only were not but could not have been made.

It must be remembered that in the present action respondent charged petitioner with fraud.

He induced a jury to penalize petitioner with punitive damages in more than double the amount of the compensatory damages, which he claimed and was awarded.

Therefore it is respectfully submitted that charges of fraud cannot rest on such indefinitive statements and conjectures.

It devolved upon the respondent to establish such fraud by clear and convincing evidence, that some material statement or fact or representation made by petitioner was false.

Respondent had access to the public records of the Probate Court in Ohio.

No such proof was offered that he had been misinformed by petitioner or that the status of the proceedings had been misrepresented to him.

The trial judge, and the District Court of Appeal alike, have absolutely failed to grasp the significance of this part of respondent's case.

Everything done said by petitioner after the making of the loan is a wholly false quantity in the case, as far as the issue of fraud is concerned. If the contract was made in good faith, the failure to perform it is not a fraud. (*Holiday v. Tolosano,* 39 Cal.App. 151; *Meehan v. Huntington Land and Improvement Co.,* 39 Cal.App. (2d) 349.

Mere failure to carry out a promise does not prove fraud in its making. (*Jacobson v. Mead,* 12 C.A.(2d) 75.)

It devolved on the respondent to establish something that amounted to fraud in this matter. Something that respondent has wholly failed to do. Courts do not exist to grant relief from an improvident

bargain, or to compensate one who has made an injudicious investment. Written instruments will not be cancelled on that ground. (*Parsons v. Smilie,* 97 Cal. 647; *Bretthauer v. Foley,* 15 C.A. 19; *Cherney v. Johnson,* 72 C.A. 725.)

(d) THE DISTRICT COURT OF APPEAL COMMITTED ERROR IN HOLDING THAT THE CASE INVOLVES AN ORAL, VOLUNTARY AND CONTINUING TRUST.

The language used at page 822 of the opinion of the District Court of Appeal is easily refutable.

The loan made by respondent to Devou certainly had none of the aspects of a trust.

The District Court of Appeal is in error when it holds that a confidential relationship existed between petitioner and respondent by reason of petitioner having acted as respondent's attorney on one occasion, but that relationship terminated in August, 1941, some two months prior to the Devou loan.

Where the relationship of attorney and client has ceased a transaction between them is valid and to avoid such transaction the former client must show that it was procured by fraud. (See *Foster v. Abrahams,* 74 Cal.App. 521.)

(e) THE INVALIDITY OF THE JUDGMENT AND PARTICULARLY THAT PORTION THEREOF WHICH AWARDS EXEMPLARY DAMAGES.

In such an action as this exemplary damages are not allowable at all.

Under the plain provisions of Section 3294 of the Civil Code of the State of California exemplary damages are allowable only "in an action for the breach of an obligation *not arising from contract* where the defendant has been guilty of oppression, fraud or malice, express or implied.

Here the action was for a breach of a contract to repay money loaned.

Here there is no suggestion that petitioner was guilty of oppression.

The element of malice either express or implied is equally lacking.

We have destroyed by what we have heretofore said that exemplary damages might be awarded because of fraud.

The record is destitute of fraud.

Under Section 3294 of the Civil Code of the State of California exemplary damages may not be recovered in an action based on a contractual obligation even though the breach of contract is wilful or malicious. (*Chelini v. Nieri,* 32 Cal.(2d) 480.)

To permit punitive damages where a party has partially performed his contract, before his breach is inconsistent with the provisions of the statute. (See

Freeman v. The Rector, Wardens and Vestrymen of St. Mary's Parish, 37 Cal.(2d) 16.)

We may add that we have never heard of an award for punitive damages for failure to pay a debt.

But it is submitted that the first judgment entered upon the verdict of the jury is wholly void.

This the District Court concedes, and after striking such judgment from the record and the purported appeal therefrom (appendix xxi) it thereupon attempts to breathe validity into such judgment by incorporating such void judgment in toto in the second judgment of January 16, 1953.

It is elementary that there can be but one judgment in any action. (*Estate of Jamison,* 31 Cal.(2d) 15.)

It is also the rule that where both legal and equitable issues are involved in the same action, the Court should first dispose of the equitable issues for two reasons, first because the disposition of such equitable issues may leave no legal issues to be determined and second because equity having once assumed jurisdiction will determine and dispose of the entire cause, even though the complete disposition thereof may involve the granting of a mere money judgment.

A court of equity having once acquired jurisdiction will adjust all differences between the parties. (*Sears v. Rule,* 27 Cal. (2d) 131; *Lewis v. Winfield,* 48 Cal. (2d) 543; *Majors v. Majors,* 70 Cal.App. (2d) 619; *Walsh v. Macaire,* 102 Cal.App.(2d) 435.)

We are presented in this case with a situation in which there are two judgments in the same action.

This cannot be.

There can be but one judgment in an action, no matter how many counts the complaint contains. (*Bank of America v. Superior Court,* 20 Cal. (2d) 697, 701.)

In *deValley v. Kendall de Vally Operalogue Co. Ltd.,* 220 Cal. 742, the court at page 745 said:

> "The law contemplates but one final judgment in a cause. As stated in the case of Nolan v. Smith, 137 Cal. 360, 361 (70 Pac. 166), quoting from Stockton etc. Works v. Glens Falls Ins. Co., 98 Cal. 577 (33 Pac. 633): 'There can be but one final judgment in an action etc.' (Citing authority.) See also Doudell v. Shoo, 159 Cal. 448 (114 Pac. 579); Middleton v. Finney, 214 Cal. 523 (6 Pac.2d 938), and Potvin v. Pacific Greyhound Lines Inc., 130 Cal.App. 510, 512 (20 Pac.2d 129.)"

If there are two judgments in a record the latter in point of time must be deemed the true and final judgment in the case. (*Galvin v. Palmer,* 134 Cal. 426, 428; *Paige v. Roeding,* 96 Cal. 388; *Von Schmidt v. Von Schmidt,* 104 Cal. 547; *Hawley v. Gray,* 127 Cal. 56.)

Accordingly the only judgment left standing in this matter is the one rendered by the trial judge in the sum of $6,939.

There is thus a legal exeunt of the exemplary damages.

It is unnecessary to argue further that the first judgment entered on the verdict of the jury was void.

The District Court of Appeal concedes that it was void. (*Alton v. Rogers,* 127 A.C.A. 810, 821.)

The Appellate Court has gone even farther than that; it has ordered the first judgment stricken from the record "and the purported appeal therefrom dismissed."

It then endeavors to give respondent his exemplary damages by ordering the void judgment which has just been stricken from the record, incorporated in the second judgment.

Such decision of the District Court of Appeal is void for want of jurisdiction.

CONCLUSION.

We believe that we have fully covered all of the grounds for a hearing on certiorari by this Court and it is respectfully submitted that without the slightest evidence of fraud, the District Court of Appeal has affirmed a void judgment of the Superior Court, not only holding petitioner liable for a debt he never did contract, but penalizing him with exemplary damages because the respondent had not collected the full amount of a promissory note.

It is respectfully submitted that this result finds no precedent in any reported decision and is unparalleled in the annals of judicial procedure.

It is likewise submitted that by denying petitioner an opportunity to be heard, the Superior Court deprived him of his property without due process of law and the equal protection of laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States and petitioner has further been denied due process of law by the District Court of Appeal and deprived of his property by reason thereof, by said court declaring the first judgment void and striking it from the record and dismissing petitioner's purported appeal therefrom, and petitioner has been deprived of his property without due process of law by said District Court of Appeal incorporating said void judgment so dismissed in a second judgment against petitioner and granting respondent costs on both appeals, when it dismissed petitioner's appeal by reason of a judgment being void.

Wherefore, your petitioner respectfully prays this Honorable Court for an order granting a hearing on certiorari and that upon such hearing that the judgment of the District Court of Appeal of the State of California, First Appellate District, Division One thereof be reversed and the cause remanded to the Court below with directions to dismiss said action, and for petitioner's costs and for such other and fur-

ther relief, as may seem meet and proper in the premises.

Dated, Oakland, California,
February 21, 1955.

Respectfully submitted,
R. A. ROGERS,
Petitioner in Propria Persona.

(Appendix Follows.)

Appendix

(Vol. 127 A.C.A. 810.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 15,928

Noel S. Alton,
Plaintiff and Respondent,
vs.
R. A. Rogers, also known as Roy A. Rogers,
Defendant and Appellant.

OPINION

In February of 1951 Noel S. Alton brought this action against R. A. Rogers, an attorney at law, and William P. Devou. On motion of plaintiff, Devou was dismissed from the action at the conclusion of the trial.* The complaint stated two causes of action based on the same transactions, the first, an equitable action for breach of trust and an accounting, and the second, a legal action for damages for fraud. The trial court, over the objections of defendant's counsel, ordered the legal action tried before a jury. The jury brought in a verdict against defendant for $6,939 compensatory and $15,000 punitive damages. Judg-

*Hereafter the term "defendant" will be used to designate R. A. Rogers.

ment on this verdict, totalling $21,939, was entered. Later, based on the same record, the court filed its findings of fact and conclusions of law in the equitable action, awarding plaintiff $6,939 damages against defendant. A second judgment in that amount was entered. This judgment contained a provision that any sums paid in satisfaction of the second judgment should constitute a *pro tanto* satisfaction of the first judgment. Defendant separately appeals from the two judgments.

Defendant was represented by counsel prior to trial. That counsel, however, on instructions from defendant, refused to participate in the trial, although, on order of the court, such counsel remained in the courtroom during the trial. Defendant was not physically present at the trial. Thus, the facts contained in the record were all produced by plaintiff, and such facts are wholly uncontradicted by any evidence produced by defendant.*

The record amply supports the implied findings of fraud and the express findings of breach of trust. The story opens in 1941. In that year the plaintiff was 21 years of age, was attending the University of California, and was a fraternity brother of defendant's son, through whom he met defendant. Plaintiff had just received an inheritance of about $19,000 and intended to invest it in a trucking operation. To this end he retained defendant as his attorney to advise

*Devou was present at the trial, testified, and was represented by counsel. This counsel participated in the trial, until, at the close of the case, plaintiff's motion to dismiss against Devou was granted.

him and to handle the legal details of the transaction. Defendant investigated the proposed transaction, advised plaintiff not to participate in it because, so he said, the risk was too great, told plaintiff that in his legal business he frequently ran across safe investment opportunities, and would get in touch with plaintiff when such an opportunity arose. Plaintiff paid defendant a legal fee for services in getting him out of the trucking deal. A short time later defendant telephoned plaintiff and told him that he had an excellent deal in which plaintiff could safely invest his money; that he had an elderly retired client named Devou who was to share in a large estate in Ohio, but who was required to post a bond in the probate proceeding and had no money to do so; that if plaintiff would lend the money to Devou for this purpose "it would be a very good investment since it was secured by several hundred thousand dollars worth of real estate in Cincinnatti"; and that if plaintiff would make the loan he, the defendant, would have a promissory note drawn providing for 7 per cent interest. Plaintiff was told that the entire transaction would probably be settled in seven or eight months, but that the note would be drawn for a full year. On these assurances, in August of 1941, plaintiff gave to defendant a check for $1,900, and again defendant promised that a 7 per cent note would be signed. Defendant wanted more money, but $1,900 was all the cash plaintiff then had available. Plaintiff suggested that his uncle might be interested in making such a safe investment, but defendant dissuaded him from communicating with his uncle, suggesting that

plaintiff should cash some war bonds and lend the proceeds to Devou. The plaintiff secured six war bonds, cashed them at defendant's bank, and handed the proceeds, $2,250, to defendant. No receipt was given. Immediately after this transaction plaintiff accompanied defendant to the latter's office where he was introduced to Devou. Except for acknowledging the introduction Devou remained silent during the interview. Defendant showed plaintiff an unsigned promissory note and told plaintiff that he would have a new note prepared covering both loans providing for 7 per cent interest. Defendant also told plaintiff that since plaintiff was about to enter the military service it would be best if he, the defendant, kept the note so that it would be available when the settlement was made. Plaintiff never saw Devou again until the time of trial.

On October 29, 1941, defendant delivered to plaintiff a cashier's check for $26.25 representing an interest payment on the loan. Between then and March of 1942, when plaintiff entered the military service about three other interest payments in substantially the same amount as the first one, were paid by defendant to plaintiff in cash. After March of 1942 no word was received from defendant until December 19, 1942, when defendant, after several prior requests for information had been ignored, sent to the plaintiff a cashier's check, purchased by defendant, for $150. The forwarding letter accompanying this check stated that defendant had just received the money for the interest from Devou, and the defendant had arranged with Devou that, after February 1, 1943, all future

interest payments would be sent to plaintiff directly from Devou.* The forwarding letter also represented that defendant was going to prepare and have signed a "new" note payable July 1, 1943.† Neither this promised note nor any further interest was then received. Thereafter, numerous requests were made by plaintiff by letter or by long distance telephone calls from various army camps asking for his interest and for the promised note. Defendant's answers to these requests were of a stalling nature and uniformly optimistic as to when plaintiff would receive his money. In October of 1943, after repeated requests, defendant telegraphed plaintiff that he would send the promised Devou note by air mail, and that the full principal and interest on the loan would be repaid by March 26, 1944. Neither the note nor any payments were then received. Throughout 1944 and until the middle of 1945 plaintiff was transferred from one army camp to another, or was overseas, and did not personally communicate with defendant, but his wife in San Francisco made several telephone calls to defendant. On each occasion defendant assured the wife that everything was fine concerning the loan. When plaintiff returned to a California base in May of 1945 he telephoned defendant on several occasions, and was told that mere technicalities were holding up the set-

*Devou denied making any payments on plaintiff's loan, denied that defendant had arranged that Devou should make such payments, denied knowing any of the details of the loan between plaintiff and defendant, and denied receiving any of the money advanced by the plaintiff.

†Plaintiff had never seen or received the note promised for the original loan, and there is no evidence that such a note was ever prepared.

tlement of the probate proceeding, but that everything was in good shape and was being taken care of by defendant. Plaintiff then was again sent overseas. Plaintiff's wife made repeated inquiries of defendant in the fall and winter of 1945. On one of these occasions defendant told her that he had two buyers for plaintiff's note and could sell it if she had a power of attorney from her husband to sign the note. She replied that she had such a power of attorney, whereupon defendant said that her husband's personal signature was necessary and without it the sale could not be consummated.

Plaintiff returned to the United States near the end of 1945 and called on defendant. He was assured that the probate matter would be cleared up in the very near future. In 1946, plaintiff, now discharged from the army, was living in Sacramento. Frequent telephone calls to defendant were answered by excuses. After considerable prodding, in December of 1946 appellant told plaintiff that the probate proceeding had been settled and that he was sending a $1,000 check at once, and that the balance owed would be paid off in $1,000 installments starting in two or three weeks. Plaintiff did, in fact, receive a $1,000 cashier's check which had been purchased by defendant. No further payments, as promised, were received. Attempts to reach defendant by telephone were unsuccessful. In April of 1947 plaintiff moved to San Francisco, and made several calls upon defendant, each time being put off with the excuse that some slight technical difficulty was holding up the payments. After re-

peated requests, on July 23, 1948, defendant handed to plaintiff a one-year promissory note, purportedly signed by Devou, in the amount of $5,339.44, which, according to defendant's computations, included all sums of interest and principal then due, less payments made. At that time defendant stated that some disagreement had arisen between Devou and his sister that would delay settlement some five or six weeks. Plaintiff then moved to Los Angeles. Hearing nothing from defendant, in October, 1948, plaintiff telephoned and was told that the matter would be settled by November. In December, 1948, plaintiff again telephoned defendant and was told that Devou was East, would return about the middle of January, 1949, and that the case would then be settled. Hearing nothing from defendant, plaintiff, in February of 1949, sent his wife to San Francisco to find out what was causing the delay. Defendant told the wife, in response to her request, that he did not know Devou's address, that he would have Devou get in touch with plaintiff, that the records she wanted were in his home safe, and that he was taking care of them. Plaintiff was disturbed by these tactics and, under date of March 16, 1949, wrote to defendant stating that he was getting suspicious because of defendant's stalling tactics, and felt that he was compelled to use legal means to collect the debt. Defendant immediately telephoned to plaintiff, chided him for his impatience, gave him Devou's address, and told plaintiff that he was so sorry for the delay that "he personally would pay the *full* amount of the original principal if Devou

didn't by November, 1949." (Italics added.) He agreed to confirm this promise in writing. He failed to do so. After considerable prodding from plaintiff, defendant did send to plaintiff an unsigned letter in which he agreed that if Devou did not pay the entire amount due by November 27, 1949, he would pay the *balance* of the original principal of $1,850, which he computed by considering the original loan as being for $3,000,* and deducting the $1,000 and $150 payments therefrom. Plaintiff protested that while he had no records of the original transactions he was sure they totalled more than $3,000, and claimed that some of the payments made to him were on interest and not principal. He received no response to this letter of protest. In the meantime plaintiff wrote to Devou and received no response. In November of 1949 plaintiff wrote to defendant reminding him of his promise to pay at least $1,850 if Devou defaulted. Defendant responded that the case would be settled by December 10, 1949. On that date plaintiff telephoned to defendant, explained that he had lost his business, was broke, and needed money. Defendant replied that he too was "completely broke," that he had been forced to borrow $1,700 on his Cadillac, and that he had only enough money left to get back to Ohio and settle the probate proceeding. He told plaintiff that he would send him $200, and that such sum was all that would be received until the case was settled. The $200 was received by plaintiff the next day. This was

*The loan was, in fact, in the sum of $4,150.

the last communication received by plaintiff from defendent.

It next appears that early in 1950 a $15,000 payment was made to Devou in the Ohio litigation. Devou testified that he knew nothing of this payment. Apparently $5,000 of this sum was divided between the Ohio attorneys and defendant as fees. At any rate, in February, 1950, the Ohio attorneys sent to defendant a check for $10,000. Appellant converted this sum into five cashier's checks as follows:

Elizabeth Venning	$3,000
Mary Kean	$2,000
Noel Alton	$1,000
R. A. Rogers	$3,789.64
William P. Devou	$ 210.36

Devou signed an instrument agreeing to the above distribution in which he stated it was in full settlement of all sums due from Devou to defendant. Devou never received his check for $210.36, nor did plaintiff ever receive the $1,000 cashier's check made out in his name. The record shows that defendant, as original purchaser of that cashier's check, cashed it himself.* This action was filed February 2, 1951.

Defendant asserts that the implied findings of fraud and express findings of breach of trust are not sup-

*Devou testified that he was not informed of the $15,000 settlement, but did know of the $10,000 payment, being informed by defendant that that sum was needed to pay sums borrowed. There is some question about the payments made to Venning and Kean. Although they testified that they loaned various sums to defendant for Devou, their testimony was very vague and uncertain, and raises a doubt as to whether such loans were ever made.

ported. The facts speak for themselves. Contrary to defendant's contention the evidence shows that the relationship of attorney and client existed between defendant and plaintiff before and at the time the loan was made. Although the loan was to be made to Devou for a specific purpose, the money was not used for that purpose. The evidence is ample to support the conclusion that the money was used by defendant to generally finance the litigation. Many fraudulent representations were made, irrespective of where the money went or who was to repay it. The wantonness and falseness of defendant's misrepresentations and conduct as shown by the record amply support an award of punitive damages. (Civ. Code, § 3294.) The amount of that award is not seriously challenged on these appeals.

Admittedly, the award of $6,939 contains an error in computation. Defendant himself determined that as of July 23, 1948, the amount due, plus interest, was $5,339.44. Extending the 7 per cent interest to December 1, 1952, the date of the trial, adds an additional $1,627.93, from which must be deducted the $200 paid in December, 1949. This leaves the balance as $6,767.37, which makes the $6,939 award excessive in the amount of $171.63. This was an obvious error in calculations which can and should be corrected by a modification of the judgment. (*Durbin v. Hillman*, 50 Cal.App. 377 [195 P. 274].)

One of the main contentions of defendant centers around the assertion that it was prejudicial error to compel defendant to go to trial before a jury before

the court had determined the equitable issues presented in the first cause of action. There is no merit in this claim.

The facts upon which this contention is based are as follows: Defendant was originally represented by counsel, and such an attorney filed an answer on his behalf. Thereafter, defendant elected to represent himself until October of 1952 when services of present counsel were secured. On October 28, 1952, the trial court entered its order "pursuant to written stipulation" of the parties setting the cause for "trial by the Court, sitting with a jury" for November 25, 1952. A week before that date defendant's counsel moved to drop the cause from the calendar on the ground that it was not one in which the plaintiff was entitled to a jury trial as a matter of right. The trial court denied the motion and assigned the cause for jury trial on December 1, 1952. On that date defendant's counsel renewed the motion requested that the equitable issue be tried first, and in any event, requested a further continuance because his client, the defendant, had been unexpectedly called out of town. After it developed that several continuances had already been granted, that defendant on November 25, 1952, had been definitely informed that no further continuances after December 1, 1952, would be granted, and that plaintiff, who had been recalled to army service, had received a special short leave to appear at the trial, the trial court denied the motions, stating that the cause should proceed to trial before a jury and that the court, on the same evidence, would dispose of the

equitable issues. Thereupon, counsel for defendant requested permission to withdraw from the case, stating that he had been instructed by his client to make such request if the motions above discussed were denied. The trial court refused to grant the request and ordered counsel to continue to represent defendant. Counsel stated that he would remain in the courtroom, but would not participate in the trial. Thereafter, the trial proceeded, defendant not appearing, and his counsel refusing to participate. As already pointed out, the jury returned verdicts of $6,939 compensatory damages and $15,000 punitive damages against defendant. Judgment on these verdicts, totalling $21,939 was entered by the clerk December 4, 1952. The motion of defendant for a new trial was denied by operation of law. Defendant filed a notice of appeal February 20, 1953.

In the meantime, on January 16, 1953, the court filed its findings and conclusions in the equitable action by which it awarded plaintiff $6,939. A second judgment in that amount was entered, from which refendant appealed on April 17, 1953.

Defendant contends that the first, or equitable cause of action should have been tried and determined first, and that only the remaining legal issues, if any, should then have been submitted to the jury. This, so it is urged, was error of a most serious nature, because, had this been done, no legal issues for a determination by the jury would have remained in the case.

It is, of course, the law that when a complaint contains a legal count and an equitable one, the plaintiff is entitled to a jury trial upon the issues raised in the legal count. (*Robinson v. Puls,* 28 Cal.2d 664 [171 P.2d 430].) There is no dispute that the second cause of action for damages for fraud was legal in nature, and that plaintiff was entitled to a jury trial on the issues there raised. But, says defendant, the equitable issues presented on the first cause of action should have been determined first. Undoubtedly it has been held that normally it is the better practice in such situations to determine the equitable issues before the remaining legal ones are submitted to a jury. (*Connell v. Bowes,* 19 Cal.2d 870 [122 P.2d 456]; *Thomson v. Thomson,* 7 Cal.2d 671 [62 P.2d 358, 117 A.L.R. 1]; *Peterson v. Peterson,* 74 Cal.App.2d 312 [168 P.2d 474]; *Angus v. Craven,* 132 Cal. 691 [64 P. 1091].) But this is not jurisdictional. The trial court has power over the order of proof. Here the trial was had before the court and jury. In its instructions to the jury the trial judge carefully distinguished between the legal and equitable issues, and took from the jury all of the issues involved in the equitable cause of action. After the jury had brought in its verdicts the trial court made its findings and conclusions on the equitable issues. This could and did result in no prejudice to defendant.

A more serious question revolves around the fact that two separate judgments were entered. There can, of course, be but one judgment in an action. Although

two judgments were here entered, an examination of the record discloses that, in fact, but one effective judgment was entered. The jury verdict on the legal issues was rendered December 3, 1952. The clerk, apparently thinking he was compelled to do so by section 664 of the Code of Civil Procedure, entered judgment on this verdict on December 4, 1952. On January 16, 1953, the trial court made its findings of fact and conclusions of law and entered judgment in the equitable action. The second judgment contained the following provision:

"It is further ordered, adjudged and decreed that any sums paid toward the satisfaction of this judgment shall be credited in a like amount toward the satisfaction of the judgment herein entered on the 4th day of December, 1952, on the verdict of the jury in the Second Cause of Action of the above entitled action, and that full satisfaction of the judgment herein entered on the verdict of the jury, as aforesaid, shall constitute a full satisfaction of this judgment."

Thus, the trial court attempted, somewhat awkwardly it is true, to incorporate the so-called first judgment into the second judgment. Had this expressly been done there can be but little doubt that, in legal effect, the first judgment would be void, but such incorporation would have resulted in their being but one effective judgment, the second, which would have included the first. This was the precise situation presented in *Shapiro v. Equitable Life Assur. Soc.*, 76 Cal.App.2d 75 [172 P.2d 725]. In that case certain special issues were submitted to a jury, and the

remaining issues to the court. After rendition of the jury verdict, on October 10, 1944, the clerk, assuming that it was his duty to do so under section 664 of the Code of Civil Procedure, entered judgment in conformity with the verdict. Findings, conclusions and judgment on the court-tried cause of action were entered on January 16, 1945. The second judgment expressly referred to the first judgment and expressly incorporated the first judgment in the second. On appeal it was contended that it was error to enter two judgments. The appellate court held that there can be, of course, but one judgment in the case, but that, under the facts, there was but one effective judgment, the second one, and that the first one was void and should be disregarded. At page 98 the court stated: "Where special issues which form only a portion of the controversy between the parties to the action are submitted to a jury and the remaining issues are tried by the court and findings of fact made thereon, no judgment can be entered in the case at the time the jury renders its verdict. The case has not been tried and the trial has not been concluded until the court has rendered its decision disposing of all issues submitted to it, and there is no decision until the court has passed upon the facts and drawn its conclusions thereon. [Citing cases.] Where, in an action for injunction and damages, the question of damages is submitted to a jury its verdict does not affect the equitable issues which are to be determined by the court upon findings of fact made by it. The clerk is without authority to enter a judgment on the verdict

where issues of purely equitable cognizance remain which the court alone can determine and which it had not determined at the time the verdict was rendered. [Citing cases.] Section 664 of the Code of Civil Procedure is directory and it is not necessary to the validity of a judgment that it should be entered within 24 hours after the verdict is rendered. [Citing a case.] The trial of this action had not been concluded when the verdict of the jury was rendered, and the judgment entered thereon having been premature was void and of no effect. [Citing cases.] * * *

"There is but one judgment in the case, to wit, the judgment of the court which followed the findings of fact determining all issues both legal and equitable adversely to appellant, which for the reasons herein stated is affirmed. The purported appeal from the void judgment entered on the verdict of the jury is dismissed."

In legal effect the situation in the instant case is quite similar to that in the Shapiro case. Here the trial court provided in the second and smaller judgment that satisfaction of the first and larger judgment would constitute a satisfaction of the smaller judgment. This would appear to amount to an incorporation of the first judgment into the second. Thus, although the first judgment is void, as having been prematurely entered, the second judgment, if it incorporates the first, is the sole valid and effective judgment. This must have been the intent of the trial court. In order to effectuate that intent this court possesses power to correct the oversight, if one was

made. In order to do so it will be provided in the order of this court that the second judgment should be modified to include, expressly, the first, and the first judgment should be declared void as having been prematurely entered and stricken from the record. (*Burke v. City & County of San Francisco,* 111 Cal. App.2d 314 [244 P.2d 708].)

It is next urged that, as a matter of law, both causes of action were barred by the statute of limitations or by waiver. These arguments are predicated on the contentions that fraud underlies both causes of action, and that such actions, under section 338, subdivision 4, of the Code of Civil Procedure, must be brought within three years of the discovery of the fraud. It is argued that the loan was made in 1941 with the agreement that it should be repaid within a year; that plaintiff knew in 1942 that the loan was not to be then repaid, and knew that he had not received regular interest or the promised note; that the fraud, if any, was fraud in the inception which plaintiff obviously discovered in the early 1940s; that if failing to invest the money as promised constituted a breach of trust, such breach occurred in 1941.

These arguments are obviously fallacious. They amount to contending that although defendant was the attorney for plaintiff, and that although defendant was fraudulent in 1941, plaintiff should not have been so credulous as to have believed the representations and continuing promises made by defendant thereafter, and should have discovered the fraud earlier.

Such arguments do not carry conviction. Moreover, in the interest of accuracy the first cause of action is not concerned with fraud. It involves an oral, voluntary and continuing trust. This trust continued until it was repudiated by defendant, and until plaintiff learned of such repudiation. (*Kornbau v. Evans,* 66 Cal.App.2d 677 [152 P.2d 651]; *Mulli v. Mulli,* 105 Cal.App.2d 68 [232 P.2d 556]; see cases collected 25 Cal.Jur. p. 271, § 133.) In view of the many reassurances given by defendant to plaintiff, the first time plaintiff knew or should have known that the trust had been repudiated was December 14, 1949, when defendant sent plaintiff $200 and unequivocally told plaintiff that the agreement would not be lived up to in that no further payments would be made until the Devou estate was settled. Thus, the action filed on February 2, 1951, was well within the statutory period, whether such period is three years as claimed by defendant, or four years as claimed by plaintiff.* While it is true that plaintiff knew that defendant was not fulfilling the promises made in 1941, defendant's continuing reassurances and optimism, in legal effect, amounted to a renewal of the original promises. The trust, under the evidence, was a continuous one. The finding of the trial court on this issue is supported by the record and by the law.

Substantially this same reasoning is applicable to the fraud cause of action. In view of the confidential

*A dictum in *Siem v. Hjelm,* 49 Cal.App.2d 148, at page 153 [121 P.2d 87], indicates that the proper period in such cases is four years.

relationship that existed between the parties plaintiff was legally entitled to rely on the many reassurances of defendant that everything was all right, and this legitimately delayed the discovery of the fraud.

Defendant contends that this cause of action fails to allege the date of discovery of the fraud, an essential allegation in such cases. (*Hobart v. Hobart Estate Co.*, 26 Cal.2d 412 [159 P.2d 958].) Defendant misinterprets the pleading. The second cause of action clearly alleges that plaintiff did not learn that his money had not been safely invested to post a bond for Devou in the probate of Devou's father's estate but was being used in a hotly contested action to construe a will and for declaratory relief until July 23, 1948, which was well within the three-year period. In view of the confidential relationship existing and clearly pleaded, this was sufficient. (*Anderson v. Thacher*, 76 Cal.App.2d 50 [172 P.2d 533]; *Rutherford v. Rideout Bank*, 11 Cal.2d 479 [80 P.2d 978, 117 A.L.R. 383].)

The next contention is that the breach of trust count is one for rescission and to recover the trust fund with interest, while the second affirms the contract and seeks damages for fraud, it being urged that such remedies are inconsistent. It is also urged that if fraud was ever part of the first cause of action the record shows that plaintiff waived the fraud and affirmed the contract by accepting the note of July 23, 1948, by accepting defendant's promise to pay $1,850 if Devou did not pay, and by accepting the $200 payment of December 14, 1949, in part performance.

The point need not be labored that causes of action based on fraud, rescission and damages are inconsistent and require an election of remedies. (*LeClercq v. Michael,* 88 Cal.App.2d 700 [199 P.2d 343]; *Evans v. Rancho Royale Hotel Co.,* 114 Cal.App.2d 503 [250 P.2d 283]; *Squire's Dept. Store, Inc. v. Dudum,* 115 Cal.App.2d 320 [252 P.2d 418].) But the rule is not here applicable. The first cause of action is not based on fraud warranting a rescission. No rescission is here involved. The first cause of action is one for breach of an oral trust. Such cause of action is not inconsistent with a cause of action for damages. (*Kornbau v. Evans,* 66 Cal.App.2d 677 [152 P.2d 651].) The evidence overwhelmingly refutes any theory of waiver. Waiver of a fraud does not occur until one has full knowledge of the facts of the fraud. (*Schied v. Bodinson Mfg. Co.,* 79 Cal.App.2d 134 [179 P.2d 380].) Here the evidence shows that as late as July of 1948, when plaintiff accepted the note, defendant told plaintiff that Devou and his sister had reached an amicable agreement, and that a complete settlement would occur in five or six weeks. In point of actual fact the action to construe the will, the contested action in which Devou was interested, was not started until sometime in 1949. Everything that plaintiff accepted from defendant was not something outside the contract that could constitute a new consideration for a revised contract, but was something that was owing to plaintiff under the original contract.

Defendant seems to make some complaint that the waiver and statute of limitations issues were not pre-

sented to the jury, though raised by answer. These were affirmative defenses pleaded by defendant on which no direct or indirect evidence was introduced by defendant. Of course, no request by defendant for any instruction on the supposed issue was ever made. Under such circumstances it was not error to fail to instruct on the issues. (*Blair v. Guarantee Title Co., Inc.*, 103 Cal.App. 260 [284 P. 719].)

Other points raised are so unsubstantial as not to require comment.

For reasons already stated it is ordered that the first judgment of December 4, 1952, having been entered prematurely, is void and ordered stricken from the record and the purported appeal therefrom dismissed; the second judgment of January 16, 1953, is ordered modified by incorporating therein *in toto* the judgment of December 4, 1952; the verdict of December 3, 1952, and the findings, conclusions and judgment of January 16, 1953, as modified, because of an error in computations, is further modified by reducing the award of $6,939 to $6,767.37. As so modified, the judgment is affirmed. The ends of justice require that plaintiff recover costs on both appeals. It is so ordered.

Peters, P. J.

Bray, J., and Wood (Fred B.), J., concurred.

Filed October 1, 1954,
Walter S. Chisholm, Clerk.

FILED
MAR 21 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 620

R. A. ROGERS, also known as
Roy A. Rogers,
Petitioner,

vs.

NOEL S. ALTON,
Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
in and for the First Appellate District,
Division One Thereof.**

ROBERT EMMETT HALSING,
785 Market Street, San Francisco 3, California,
Attorney for Respondent.

CHARLES W. ROBERTSON,
EDWARD A. HAMMER,
821 Market Street, San Francisco 3, California,
Of Counsel.

Subject Index

	Page
Introduction	1
Argument	2
I. No federal question was decided by the state court	2
Conclusion	7

Table of Authorities Cited

Cases	Page
Brown v. Coffee, 17 Cal. App. 381; 121 P. 309	6
Chicago I. & L. R. Co. v. McGuire, 196 U.S. 128; 49 L.Ed. 413; 25 S.Ct. 200	6
Edelman v. California, 344 U.S. 357; 97 L.Ed. 387; 73 S.Ct. 293	7
Nemo v. Farrington, 7 Cal. App. 443; 94 P. 874	6

Rules

Rules on Appeal: Rule 29(b)	5
Revised Rules of the Supreme Court of the United States: Rule 21(6)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 620

R. A. ROGERS, also known as
Roy A. Rogers,
Petitioner,

vs.

NOEL S. ALTON,
Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
in and for the First Appellate District,
Division One Thereof.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

INTRODUCTION.

The "Statement of the Case" and the facts set out in the "Introduction" of the petition for a writ of

certiorari are not complete nor are they accurate. The District Court of Appeal, State of California, has fully reviewed the case in its opinion (127 Cal. App. 2d 667, 669; 274 Pac. 2d 487) and respondent in his brief filed in said District Court of Appeal set forth a "Statement of Facts Proved" with citations to the record (BR 2-35), which statement was not disputed by petitioner in his reply brief filed in said District Court.

Respondent is informed and believes that the transcript of the record filed by petitioner for a writ of certiorari did not include certified copies of the briefs filed in the District Court of Appeal, State of California, the petition for a hearing by the Supreme Court of the State of California, nor respondent's answer in opposition to said petition. Pursuant to Rule 21 (6) of the Revised Rules of the Supreme Court of the United States, respondent has filed certified copies of said briefs, petition and answer along with this brief.

ARGUMENT.

I. NO FEDERAL QUESTION WAS DECIDED BY THE STATE COURT.

No federal question was raised in the trial court. The grounds relied upon by petitioner in his appeal to the District Court of Appeal, State of California, are set forth on pages 15 and 16 of Appellant's Opening Brief filed in said court. None of these grounds involved a federal question nor was any claim made in said District Court of Appeal that a federal ques-

tion was involved. The opinion of said District Court of Appeal did not decide any federal question either directly or indirectly (127 Cal. App. 2d 667; 274 Pac. 2d 487).

The foregoing facts are not disputed. Petitioner contends that he raised a federal question in his petition for a hearing by the Supreme Court of the State of California and that said Supreme Court necessarily decided a federal question when it denied his petition. Said order of denial was made by the Supreme Court of California without a written opinion.

On pages 4 and 5 of his petition to the Supreme Court of California for a hearing, petitioner set forth the grounds on which he relied, as follows:

"GROUNDS FOR HEARING BY THE SUPREME COURT

"(1) The complaint of respondent does not, nor does either of the counts thereof, state facts sufficient to constitute a cause of action for fraud or to entitle the respondent to any relief against appellant.

"(2) The evidence was insufficient as a matter of law to establish fraud on the part of appellant.

"(3) The evidence produced by the plaintiff, both oral and documentary, shows without conflict that his claim was barred by the statute of limitations.

"(4) The District Court of Appeal has committed error in holding that the allegations of the complaint touching the discovery of the al-

leged fraud were sufficient and in holding that the case involves an oral, voluntary and continuing trust, when the evidence conclusively negatives any theory of a trust.

"(5) The District Court of Appeal has committed error in upholding the action of the trial court in submitting legal issues to the jury without first disposing of the equitable issues.

"(6) The judgment for both compensatory and punitive damages is admittedly void, and is specifically stated to be void by the District Court of Appeal, which has committed error in ordering the void judgment incorporated in a subsequent judgment.

"(7) The District Court of Appeal has committed error in holding against the claim of appellant that the causes of action are inconsistent and that an election was required.

"(8) The District Court of Appeal has erred in ruling against the claim of appellant that the fraud, if any, was waived by the conduct of the respondent.

"(9) Material facts were omitted and incorrectly stated in the opinion of the District Court of Appeal.

"(10) The lower Court committed error in denying the motion of the defendant and appellant for a new trial.

"(11) The District Court of Appeal has committed error in upholding the award of punitive damages.

"(12) The evidence conclusively shows that plaintiff and respondent loaned money to the wit-

ness Devou, that his claim was against Devou alone, that appellant did not hold any funds of respondent in trust, that respondent's sole remedy was by an action on the note, for the payment of which there was no liability whatsoever on the part of appellant."

None of said grounds raised or involved a federal question.

The quotations from said petition to the Supreme Court of the State of California set out on pages 8 and 9 of the petition to this Court are taken from the introduction (p. 3), the conclusion (p. 82-83) and an unnumbered page opposite page one. They are but general conclusions and at no other place in said petition are they mentioned or argued.

Petitioner did not petition the District Court of Appeal, State of California, for a rehearing and Rule 29 (b) of the Rules on Appeal of the State of California was applicable on his petition to the Supreme Court of California for a hearing. Said Rule 29 (b) reads as follows:

"(Examination of record) On petition for hearing the Supreme Court will not examine the record for error, or inquire into the correctness of the facts stated in the opinion unless the petition shows: (1) That material facts were omitted from or incorrectly stated in the opinion of the District Court of Appeal and that the alleged omission or other inaccuracy was set forth in a petition for rehearing and not corrected by the District Court of Appeal; or (2) that substantial legal issues raised in the briefs were not con-

sidered in the opinion, and that the failure to consider them was set forth in a petition for rehearing."

Regarding the alleged federal questions which petitioner contends he raised in his petition to the Supreme Court of the State of California for the first time, the law is settled in California that such a petitioner cannot ask in effect a first hearing of a question which should have been raised in the District Court of Appeal and this is a sufficient reason to deny such a petition. (*Nemo v. Farrington,* 7 Cal. App. 443, 451; 94 P. 874; Opinion of Supreme Court of California denying hearing. *Brown v. Coffee,* 17 Cal. App. 381; 121 P. 309, 311; Opinion of Supreme Court of California denying hearing.)

The mere allegation that a federal right has been violated, first made in a petition in the highest state court for review of the judgment of an intermediate appellate court, is too late to serve as a basis for the exercise of the appellate jurisdiction of the Supreme Court of the United States, where it does not affirmatively appear that the state court passed upon the alleged federal question, and where according to the state law the failure to have raised the alleged federal question at an earlier stage in the state courts is a ground for the denial of such petition for review by the highest state court. (*Chicago I. & L. R. Co. v. McGuire,* 196 U.S. 128, 131; 49 L.Ed. 413, 415; 25 S.Ct. 200.) The Supreme Court of the United States is without power to decide whether constitutional rights have been violated when the federal questions

are not seasonably raised in accordance with the requirements of state law. (*Edelman v. California*, 344 U.S. 357; 97 L.Ed. 387; 73 S.Ct. 293.)

CONCLUSION.

No federal question was raised in or decided by the trial court or the District Court of Appeal, State of California. Petitioner contends that he first raised a federal question in his petition to the Supreme Court of the State of California for a hearing after decision by the District Court of Appeal, State of California. Said petition was denied by the Supreme Court of the State of California without opinion. The law in the State of California holds that new questions cannot be raised for the first time in such a petition to the State Supreme Court. This alone was a sufficient basis for the State Supreme Court to deny a hearing as to the alleged federal questions. Since no federal question was decided by the courts of the State of California, the Supreme Court of the United States has no jurisdiction to grant a writ of certiorari.

Dated, San Francisco, California,
March 14, 1955.

Respectfully submitted,
ROBERT EMMETT HALSING,
Attorney for Respondent.

CHARLES W. ROBERTSON,
EDWARD A. HAMMER,
Of Counsel.